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Supreme Court of the United States.

OCTOBER TERM, 1940.

314-630
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No. 1068 93

M. JACOBSON & SONS TRUST,
Petitioner,
v.
DOUGLASS M. BOMEISLER ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

FRANCIS P. GARLAND,
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FRANK P. RYAN,
SAMUEL PERMAN,
BERGE C. TASHJIAN,
Of Counsel.

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INDEX.

	Page
Petition	1
Statement of the matter involved	1
Jurisdiction	3
Questions presented	4
Reasons for granting the writ	4
Brief	6
Opinions below	6
Jurisdiction	6
Statement of the case	6
Specification of errors	6
Summary of argument	7
Argument	7
I. The defendant trust is not liable on speculative contracts, under the decisions of the Supreme Judicial Court for the Commonwealth of Massachusetts	7
A. The contracts entered into were speculative or wagering contracts	7
B. Speculative contracts of the nature sued upon are not within the purposes of the trust and are not binding upon it	10
II. The holding of the Circuit Court of Appeals for the First Circuit that there was unanimity of action among the trustees by ratification is in conflict with the decisions of the Supreme Judicial Court of Massachusetts	15
Conclusion	18

TABLE OF AUTHORITIES CITED.

Ashley v. Winkley, 209 Mass. 509	10
Boston v. Robbins, 126 Mass. 384	16
Bowen v. Farley, 256 Mass. 19	18

	Page
Bremer v. Hadley, 196 Mass. 217	10
Clark v. Murphy, 142 Kans. 426	13, 14
Downey Co. v. 282 Beacon Street Trust, 292 Mass. 175	13, 16
Downey Co. v. Whistler et al., 284 Mass. 461	10, 13, 16
Dumaine v. Dumaine, 301 Mass. 214	11
Greco v. Hubbard et als., 252 Mass. 37	10
Horgan v. Morgan, 233 Mass. 381	18
Horowitz v. State Street Trust, 283 Mass. 53	13, 16
Howe v. Howe, 199 Mass. 598	17
Lawson Bros. & Co. v. Turner, 277 Fed. 680	13, 14
Loughery v. Bright, 267 Mass. 584	16
Poirier v. Terceiro, 224 Mass. 435	17
Rand v. Farquhar, 226 Mass. 91	18
Scandinavian Import-Export Co. v. Bachman, 195 App. Div. 297	13
Trion Mfg. Co., In re, 214 Fed. 161	14
Tuttle v. The First National Bank of Greenfield, 187 Mass. 533	11
Judicial Code, section 240 (a), as amended by Act of February 13, 1925, chapter 299, 43 Stat. 936	6
Scott on Trusts, volume 1, page 55, section 6.3; volume 2, page 1053, section 194	16
Scott on Trusts, volume 2, page 1206, section 227.6	12

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, M. Jacobson & Sons Trust, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit entered March 17, 1941 (Record, p. 38), reversing with directions the judgment of the District Court of the United States for the Massachusetts District entered April 9, 1940 (R. 13).

STATEMENT OF THE MATTER INVOLVED.

This suit was brought to recover $5458.34, the balance alleged to be due the plaintiffs, Douglass M. Bomeisler *et al.*, a brokerage firm, from the defendant, M. Jacobson & Sons Trust, a Massachusetts business trust, on an account carried

between the parties for the execution of purchases and sales of contracts for future delivery on the New York Commodity Exchange (R. 2-6).

The defendant asserts that it is not liable to the plaintiffs because the transactions which form the basis of the plaintiffs' claim were speculative and, hence, outside the purposes of the defendant trust; and because Eli Jacobson, one of the defendant's trustees, did not have authority to enter into these transactions on the defendant's account. By counterclaim the defendant seeks to recover $7933.39, the amount by which payments made by it to the plaintiffs exceeded payments made by the plaintiffs to the defendant (R. 7, 8).

The defendant is a Massachusetts business trust organized pursuant to Massachusetts General Laws (Ter. Ed.) c. 182, under a written declaration of trust dated August, 1931, and filed with the Department of Corporations & Taxation for the Commonwealth of Massachusetts on September 30, 1931, a copy of which was offered as an exhibit by the plaintiffs (R. 19) and may be found in the record (R. 85-90).

The defendant's declaration of trust entrusted the active management of its business to three trustees, Eli Jacobson, N. Robert Jacobson, and Nathan L. Jacobson (R. 85-86). The declared purposes of the trust are set forth in the record (R. 85, 86).

In 1936 Eli Jacobson opened an account with the plaintiffs, in the name of the defendant trust, for the purchase of contracts on margin for the future delivery of hides (R. 19). Over the course of two and a half years, Eli Jacobson ordered the purchase of approximately fifty futures contracts, each contract involving approximately 40,000 pounds of hides with an average value of $4000 (R. 46). The contracts were always sold before delivery date, and hence no hides were actually delivered as a result of the transactions between the plaintiffs and the defendant (R. 43), but from

time to time balances were struck and the plaintiffs would mail a check to Eli Jacobson payable to the Chicago Dressed Beef Company, or Eli Jacobson would mail the plaintiffs the defendant's check to make up the loss.

The case was tried to a jury, and a verdict was returned for the plaintiffs on their claim in the sum of $5458.34 (R. 11); and on the defendant's counterclaim a verdict was returned for the plaintiffs (R. 11). Thereupon judgment was entered on April 5, 1940, in accordance with the verdicts (R. 11). On April 9, 1940, the judgment for the plaintiffs on its claim was reopened, the jury verdict set aside, and judgment was entered for the defendant in accordance with its motion for a directed verdict; the judgment for the plaintiffs on the defendant's counterclaim was allowed to stand (R. 12, 13).

From the foregoing final judgments both parties appealed to the Circuit Court of Appeals, First Circuit, where the judgment for the plaintiffs on the defendant's counterclaim was affirmed, and the judgment for the defendant on the plaintiffs' claim was reversed, and judgment ordered for the plaintiffs in accordance with the jury verdict (R. 138).

Jurisdiction.

This suit was commenced in the United States District Court for the District of Massachusetts on the ground of diversity of citizenship, the matter in controversy exceeding, exclusive of interest and costs, the sum of three thousand dollars ($3000).

The final judgment of the Circuit Court of Appeals for the First Circuit was entered March 17, 1941 (R. 138). The jurisdiction of this Court to review the judgment of the Circuit Court of Appeals for the First Circuit is invoked under section 240 (a) of the Judicial Code (28 U.S.C. section 347 (a)).

Questions Presented.

The Circuit Court of Appeals for the First Circuit in reversing the decision and judgment of the United States District Court for the Massachusetts District has held—

1. That the defendant, organized as a trust for business purposes, can engage in speculative enterprises, and is bound by contracts involving speculation in futures contracts;
2. That the acts of one of the trustees could be ratified and were ratified by the other trustees by knowledge of the dealings of one and failure to object; and
3. That the contracts were not gaming contracts, illegal, and therefore unenforceable.

The judgment of the District Court should have been affirmed if any one of the above three propositions is not sound or in accordance with the established principles of law, and those questions are presented for determination by this Court.

Reasons for Granting the Writ.

The petitioner is aware that the denial or granting of certiorari is a discretionary matter, but respectfully urges an allowance of a writ in this case because the decision of the Circuit Court of Appeals for the First Circuit is in direct conflict with the applicable decisions of the Supreme Judicial Court for the Commonwealth of Massachusetts with respect to the powers of trustees and trusts. This is an important matter of local law since the business trust is a widely used form of business organization involving a fiduciary relationship.

In addition to the above it is respectfully submitted that the reversal of the action of the District Court manifests on its facts a conflict between that Court and the Circuit Court of Appeals for the First Circuit. The decision is directly in conflict with the holding of the United States District Court for the District of Georgia.

It is therefore respectfully requested that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals, for the First Circuit, reversing that of the District Court for the District of Massachusetts, be granted.

FRANCIS P. GARLAND,
Attorney for Petitioner.

FRANK P. RYAN,
SAMUEL PERMAN,
BERGE C. TASHJIAN,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the First Circuit has not yet appeared in the Federal Reporter. It was handed down March 17, 1941, and is on pages 130 to 138 of the record. The decision of the United States District Court for the District of Massachusetts (Sweeney, J., April 9, 1940) is on page 12 of the record.

Jurisdiction.

Jurisdiction of the United States District Court is founded upon diversity of citizenship. Each of the partners in the plaintiffs' firm is a citizen of a state other than Massachusetts (R. 2). By stipulation filed in the Circuit Court of Appeals for the First Circuit, pursuant to 28 U.S.C. section 399, it appears that at all times involved in the litigation all of the trustees and all of the shareholders in the defendant trust have been residents of Worcester, Massachusetts (R. 130). The case involves more than $3000 exclusive of interest or costs (R. 3).

The jurisdiction of this Court to review the judgment of the Circuit Court of Appeals for the First Circuit is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, chapter 229, 43 Stat. 936, 938-939.

Statement of the Case.

The case is stated in the petition (*ante*, pp. 1-3).

Specification of Errors.

The issues presented are stated in the petition (*ante*, p. 4).

Summary of Argument.

I. The holding of the Circuit Court of Appeals for the First Circuit that the trust could be bound on speculative contracts was error and is in conflict with the decisions of the Supreme Judicial Court for the Commonwealth of Massachusetts, and with decisions of the United States District Court of Georgia, and of the United States District Court for the District of Massachusetts.

II. The holding of the Circuit Court of Appeals for the First Circuit that ratification by the co-trustees of the acts of one trustee could be inferred was error, and conflicts with decisions of the Supreme Judicial Court for the Commonwealth of Massachusetts and the decision of the United States District Court for the District of Massachusetts.

Argument.

I. The defendant trust is not liable on speculative contracts, under the decisions of the Supreme Judicial Court for the Commonwealth of Massachusetts.

A. The contracts entered into were speculative or wagering contracts.

The obligation upon which recovery is sought by the plaintiffs is the balance due upon a margin account covering alleged purchases and sales of contracts for the future delivery of hides. It is to be observed that actual deliveries were never made to anyone, but profit or loss was determined by striking a balance at certain intervals.

Transcript of Record, pp. 43 and 44.

The trustee who, it is alleged, acted in behalf of the trust never intended to receive actual delivery of the hides, and

that was the understanding with Mr. McCarthy, commodity salesman representing the plaintiffs.

Transcript of Record, p. 82.

The trust was not engaged in the actual purchase and sale of hides, but incidental to its slaughtering business would have approximately 1000 hides a year for sale. It had these only as a by-product of its principal business of dealing in meat.

Transcript of Record, p. 77.

The quantities involved in the contracts with the plaintiffs were in fact about thirty-five to forty times greater than the average number of hides the defendant would normally have on hand in consequence of its slaughtering business. This was testified to by the plaintiffs' witness Daly. *In other words, a single purchase of a single futures contract in smallest quantity dealt with on the exchange involved the same quantity of hides which the defendant trust would normally accumulate in one year.*

Transcript of Record, p. 46.

The record is replete with evidence that the transactions were carried out on margin accounts for speculation and that variations occur hourly and daily on the commodity market.

Frank P. Daly testified as follows:

> "We either pay or draw a draft on them [clearing associations] for the money that may be due us and in connection with this contract at the time it is made, we make a cash deposit with the clearing house association and if the contract varies from day to day, we would

continue to advance our moneys to keep the contract good with the clearing house to the market price."

Transcript of the Record, p. 33.

Mr. McCarthy testified as follows:

"On the following Tuesday, I called him on the telephone and said, 'I want $4000. for your margin requirements' and while I was talking with him on the telephone, the market dropped again and I requested $6000. in margin requirements at the end during the same conversation, so that while we were talking on the telephone, the market had dropped so that we required not $4,000. but $6,000."

Transcript of the Record, p. 64.

The Circuit Court of Appeals for the First Circuit acknowledges the speculative nature of these contracts when it states in the opinion rendered in this case:

"It is certainly true that trustees of the conventional type of nonbusiness trust will not ordinarily be permitted to invest in anything so speculative as futures contracts."

Transcript of the Record, p. 136

Where, as here, the intention of the trustee, who purported to act on behalf of the trust, was never to receive actual delivery of the hides, where the purchases and sales of contracts were made on margin accounts, where there were substantial fluctuations in the price on the market during the course of a telephone conversation, and where the purchase and sale of hides was not a part of the trust business, it is apparent that the contracts were entered into

solely with speculative intent as pure betting or wagering transactions. It might fairly be said that Eli Jacobson was gambling with trust funds.

B. Speculative contracts of the nature sued upon are not within the purposes of the trust and are not binding upon it.

The purposes of the trust as set forth in its declaration filed with the Department of Corporations and Taxation provided:

> ". . . Its purpose is to buy, sell, import and export live stock of all kinds and to deal in meats and meat products in all its branches, to erect abattoirs, cold storage warehouses, slaughter houses, packing houses and other structures necessary for its business, to slaughter live stock of all kinds, and deal generally in hides and all other animal products; particularly to carry on the business formerly conducted in the cities of Worcester and Clinton, Massachusetts under the name of M. Jacobson & Sons . . ."

That the powers of the trustees to do any act are restricted to those granted in the declaration of trust is elementary and has been accepted almost without discussion in the cases.

Bremer v. *Hadley,* 196 Mass. 217.
Downey Co. v. *Whistler et al.,* 284 Mass. 461.
Ashley v. *Winkley,* 209 Mass. 509, at 527.

And it is well established that the trust instrument is to be construed strictly, resolving all doubts toward the protection of the *cestuis que trust* or beneficiaries.

Greco v. *Hubbard et als.,* 252 Mass. 37, at 43.

Dumaine v. *Dumaine,* 301 Mass. 214.
Tuttle v. *The First National Bank of Greenfield,* 187 Mass. 533.

In commenting upon the construction of a trust instrument in *Dumaine* v. *Dumaine* (*supra*) the Court said at page 222:

> "It is not for the Court to read into a trust instrument provisions which do not expressly appear or which do not arise by implication from the plain meaning of the words used."

And again at page 218:

> "And in making this determination, we must be guided by the well known principle of law that the whole instrument is to be considered, aided by the surrounding circumstances, due weight being given to all its language, with some meaning being given, if possible, to all parts, expressions and words used, discarding and disregarding no parts as meaningless, if any meaning can be given them consistently with the rest of the instrument."

It is to be observed that the declaration of trust in the case at bar provided that its purpose was ". . . particularly to carry on the business formerly conducted in the cities of Worcester and Clinton, Massachusetts under the name of M. Jacobson & Sons . . . ," which was the slaughter of live stock, purchase and sale of meat.

In *Tuttle* v. *The First National Bank of Greenfield* (*supra*) the trustee was directed to invest in property "according to his best judgment and direction . . . with full power to change any investment at his discretion." He pledged cer-

tain trust stock as collateral for a loan on a promissory note which he signed as trustee, the proceeds of which were expended for purposes for which the income lawfully could have been appropriated. The Court held that the bank acquired no title to the stock, saying:

> "But this power did not clothe him with authority to pledge any part of the fund as security for the payment of a promissory note made by him as trustee although the money received went into the trust funds, and was expended for purposes for which the income lawfully could have been appropriated."

Speculation has never been held to be within the powers of a trustee. As stated by Professor Scott in his treatise on the law of trusts:

> "On the other hand, certain kinds of investments are universally condemned. It is improper for a trustee to purchase securities for speculation. Although the line between what constitutes speculation and what constitutes a business man's risk and what constitutes a prudent investment is drawn in different places by different courts. It is clear, of course, that a trustee cannot properly purchase securities on margin; nor can he properly purchase speculative shares of stock; or bonds selling at a large discount because of the uncertainty as to whether they will be paid at maturity."
>
> Scott on Trusts, volume 2, page 1206, section 227.6.

The Circuit Court of Appeals for the First Circuit acknowledges that the rule is as stated in Professor Scott's treatise, but it is stated in the opinion that strict construction of trust instruments is not applicable to "business

trusts of the type considered here," and that the trust "instrument should be considered as analogous to a corporate charter and as broadly interpreted."

Transcript of Record, p. 137

There is no citation of authority by the Circuit Court of Appeals for the First Circuit for that proposition of law, and it is respectfully submitted that it is not sound, and is contrary to the adjudicated cases in Massachusetts.

Downey Co. v. *Whistler,* 284 Mass. 461.
Horowitz v. *State Street Trust,* 283 Mass. 53.
Downey Co. v. *282 Beacon Street Trust,* 292 Mass. 175.

The cases cited above involved trusts organized for the purpose of conducting realty businesses. The rules governing trusts generally were carried over and strictly applied in those cases, and certainly there is no sound reason for a distinction between a realty business and meat business.

After ruling that the trust instrument involved in the case at bar should be interpreted in accordance with the rules governing corporate charters, the Circuit Court of Appeals holds that the transactions involved were within the powers of the trustees. In support of that statement the Court has cited *Scandinavian Import-Export Co.* v. *Bachman,* 195 App. Div. 297; *Lamson Bros. & Co.* v. *Turner,* 277 Fed. 680 (C.C.A. 8, 1921); and *Clark* v. *Murphy,* 142 Kans. 426 (R. 137). The cases cited are not applicable to the case at bar because, first, they are concerned with corporations and corporate charters, and secondly, the decisions are based upon different facts from those presented here.

The case of *Scandinavian Import-Export Co.* v. *Bachman,* 195 App. Div. 297, involved a corporation that was expressly

granted the power to purchase securities, and was otherwise given comprehensive powers under which it could embark in any lawful business in any place within the jurisdiction of the United States and in foreign countries. It further appeared the only business in which it engaged was that involved in the litigation. The Court acknowledged in that case that the rule would be different with respect to trusts, saying, at page 304:

> "It is, of course, well settled that a trustee may not speculate with trust funds . . ."

In *Lamson Bros. & Co.* v. *Turner,* 277 Fed. 680 (C.C.A. 8, 1921), the question before the Court was whether the contracts for the purchase and sale of futures entered into by the corporation were wagers, and hence illegal contracts. It was there held that the particular contracts before that Court were not illegal. That issue is not argued here in support of the petition to grant a writ of certiorari.

In *Clark* v. *Murphy,* 142 Kans. 426, the corporation in question was organized "to engage in buying, selling, and handling grain, feed, fuel, supplies, and produce, and engaging in all kinds of business usually carried on by farmers' elevator and supply companies." It was there held that *elevator* companies usually engaged in transactions involving futures contracts.

The Court has referred to the case of *In re Trion Mfg. Co.,* 214 Fed. 161 (D.C. N.D. Ga.), in which the powers conferred upon the corporation were analogous to those granted the defendant trust, and it was there held that, even though the purchase and sale of cotton was within the powers of the corporation, speculation in cotton futures was clearly *ultra vires,* the Court saying:

> "This record shows, however, and I think conclusively that Mr. Hamilton was trading in the name of the Trion

> Manufacturing Company, that is, buying and selling cotton futures as a mere matter of speculation, which, in my opinion he could not legally do. The Corporation could not be bound by any such acts of his as are shown here. These acts were clearly *ultra vires.* No power is shown in the charter to authorize the corporation to go into such business. It was a corporation to manufacture cotton goods. *While the power is given to buy and sell cotton, this could not carry with it the implication that it was authorized to speculate in cotton.*" (Italics ours.)

It is respectfully submitted that the holding of the Circuit Court of Appeals for the First Circuit that the trustees of the defendant trust had power to engage in speculative transactions is in conflict with the decisions of the Supreme Judicial Court of Massachusetts and the United States District Courts.

II. THE HOLDING OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT THAT THERE WAS UNANIMITY OF ACTION AMONG THE TRUSTEES BY RATIFICATION IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

The contracts which form the basis of this litigation were entered into by Eli Jacobson, one of three trustees of the defendant trust, and the plaintiffs. The Circuit Court of Appeals for the First Circuit has assumed that "Eli Jacobson in his dealings with the plaintiff firm could not bind the trust without the concurrence, in some form, of his cotrustees."

Transcript of Record, p. 135

The decisions in Massachusetts so hold.

> *Horowitz* v. *State Street Trust Co.*, 283 Mass. 53.
> *Downey Co.* v. *282 Beacon Street Trust*, 292 Mass. 175.

And that is the universal rule.

> Scott on Trusts, volume 1, page 55, section 6.3; volume 2, page 1053, section 194.

The Circuit Court of Appeals for the First Circuit then asserts that "unanimity can be achieved by subsequent ratification of the acts of a single trustee," and that "such ratification may be inferred from knowledge of a course of dealing and failure to object to it."

> Transcript of Record, p. 35

It is respectfully submitted that there was no valid ratification of the acts of Eli Jacobson in the case at bar.

> *Downey Co.* v. *Whistler*, 284 Mass. 461.
> *Boston* v. *Robbins*, 126 Mass. 384.
> *Loughery* v. *Bright*, 267 Mass. 584.

The case of *Downey Co.* v. *Whistler* (*supra*) deals at length with the authority of trustees of a business trust. The trust instrument in that case was a matter of public record as in the case at bar, and the Court there held that there could be no ratification of the acts of a trustee by a co-trustee, saying, at page 465:

> "From this provision it is clear that Henderson, acting alone, had no power or authority to bind the trust, and as the plaintiff had at least constructive notice of

the terms of the trust, it follows that it knew that Henderson alone had no power to bind the trust. The other trustee, Roger B. Tyler, did not learn of the contract until long after the contract was completed. He, therefore, could not be held to have ratified, if he legally could, the contract between the plaintiff and the trust by Elliott Henderson, trustee."

So, in the case at bar, there was no affirmative evidence that Nathan Jacobson, one of the trustees, had any knowledge of the contracts until after they were completed.

The only direct evidence as to knowledge on the part of the other trustees came from Eli Jacobson, and it appeared that Nathan Jacobson did not know about the contracts at the time of the trial in the United States District Court.

Transcript of Record, p. 76.

There being no affirmative evidence of knowledge or ratification by Nathan Jacobson, no inference can be drawn from his failure to testify as stated by the Circuit Court of Appeals for the First Circuit.

Poirier v. *Terceiro,* 224 Mass. 435.

The case of *Howe* v. *Howe,* 199 Mass. 598, cited by the Circuit Court of Appeals for the First Circuit, is inapplicable, since in that case there was affirmative evidence to be met by an available witness.

It appears that Eli Jacobson intended these transactions to be his own, and the defendant's name was used merely because margin sales would not be made on his own credit. This is manifested by the heading of the bookkeeping account: "Eli Jacobson—E. A. Pierce & Company."

Transcript of Record, p. 51.

The above account would also serve to forestall any knowledge on the part of the other trustees that Eli Jacobson had contracted with the plaintiffs in behalf of the defendant trust.

It likewise appears that none of these transactions would be apparent by an examination of the profit and loss statements.

Transcript of Record, p. 79.

Furthermore, it is not likely that the co-trustees would ratify these contracts, even if they could do so, at a time when it was apparent that Eli Jacobson had sustained substantial losses.

The cases of *Rand* v. *Farquhar,* 226 Mass. 91, and *Bowen* v. *Farley,* 256 Mass. 19, cited by the Circuit Court of Appeals for the First Circuit, were actions enforcing liability of a trustee not in his representative capacity, and are inapplicable here.

The case of *Horgan* v. *Morgan,* 233 Mass. 381, cited by the Circuit Court of Appeals for the First Circuit in support of its statement that ratification may be inferred "from knowledge of a course of dealing and failure to object to it," was an action against co-partners, where it is admitted the rule is applicable. It further appears the contracting party in that case had express authority to enter into the contract in question.

Conclusion.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals for the First Circuit in reversing the judgment of the United States District Court was error and conflicts with the decisions of the Supreme Judi-

cial Court of Massachusetts on important questions of local law, and that the issues involved should be determined by this Court.

FRANCIS P. GARLAND,
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BERGE C. TASHJIAN,
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INDEX.

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement of Facts	2–8
Summary of Argument	8
Argument	8–15
I. The petitioner could not under Massachusetts law avail itself of the defenses of illegality and *ultra vires* as it had ample power to carry on the transactions involved and it received full benefit from them	8–11
Petitioner's cases distinguished	10, 11
II. The petitioner is not permitted by the law of Massachusetts to escape liability on the ground that the evidence was insufficient to warrant the jury verdict.	12–15
III. Conclusion	15

TABLE OF CASES.

Ashley v. Winkley, 209 Mass. 509	10
Bazirgan v. Arnold & Sears, Inc., 275 Mass. 207	9
Board of Trade v. Christie Grain and Stock Co., 198 U. S. 236	8
Bowen v. Farley, 256 Mass. 19	12
Bremer v. Hadley, 196 Mass. 217	10
Dolben v. Gleason, 292 Mass. 511	10
Dome Realty Co. v. Gould, 285 Mass. 294	11
Downey Co. v. The 282 Beacon Street Trust, 292 Mass. 175	11
Downey Co. v. Whistler, 284 Mass. 61	11
Dumaine v. Dumaine, 301 Mass. 214	10

Page

Edwards v. International Pavement Co., 227 Mass. 206 . 11
Erie R. Co. v. Tompkins, 304 U. S. 64 2
Forgeron v. Corey Hill Garage, Inc., 249 Mass. 163 . . 12
Glovin v. Eagle Clothing Co., 247 Mass. 215 . . . 12
Greco v. Hubbard, 252 Mass. 37 10
Harris v. Friedmann, 245 Mass. 479 9
Hartford v. Mass. Bowling Alleys, Inc., 229 Mass. 30 . 12
Horgan v. Morgan, 233 Mass. 381 . . . . . 14, 15
Horowitz v. State Street Trust Co., 283 Mass. 53 . . 10, 11
Howe v. Howe, 199 Mass. 598 14
Hull v. Newhall, 244 Mass. 207 13
Interstate Circuit v. United States, 306 U. S. 208 . . 14
Irwin v. Williar, 110 U. S. 499 9
Kirby v. Tallmadge, 160 U. S. 379 14
Lester v. Webb, 1 Allen 34 12
McKean Co. v. Sidebottom, 277 Mass. 158 . . . 11
Nims v. Mt. Hermon Boys' School, 160 Mass. 177 . 11, 12, 15
Poirier v. Terceiro, 224 Mass. 435 14
Rand v. Farquhar, 226 Mass. 91 13
Reed v. Ashburnham Railroad Co., 120 Mass. 43 . . 12
In re Rosenbaum Grain Corp. 103 F. (2d) 656 (C. C. A. 7) . 8
Runkle v. Burnham, 153 U. S. 216 14
Ryan v. Whitney, 257 Mass. 218 9
Savoy Finance Co. v. DeBiase, 281 Mass. 425 . . . 9
Tuttle v. First National Bank of Greenfield, 187 Mass. 533 . 10
United States v. N.Y. Coffee and Sugar Exchange, 263 U. S. 611 8
West v. American Tel. & Tel. Co., 311 U. S. 223 . . 2
Whittier v. Child, 174 Mass. 36 13
Young v. United Zinc Cos., 198 Fed. 593 (C. C. A. 1) . 11
Zevitas v. Adams, 276 Mass. 307 12

In the

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 93.

OCTOBER TERM, 1940.

No. 1069.

M. JACOBSON & SONS TRUST,
Petitioner,
v.
DOUGLASS M. BOMEISLER, ET ALS.,
CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF E. A. PIERCE & COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the First Circuit ordering judgment for these respondents pursuant to the jury's verdict is reported in 118 Fed. (2d) 198 (pamphlet issue of April 28, 1941). It appears in the record pages 130-138.

The District Judge in reopening the original judgment entered on the verdict and setting that judgment aside (R. 13) filed no opinion. The charge of the District Court to the jury, under which was returned a verdict for the

respondents, plaintiffs, (R. 11) in the full amount of their claim, appears in the record pages 115 to 126 and 128.

Jurisdiction.

The suit was brought by the respondents in the District Court for the District of Massachusetts on the ground of diversity of citizenship in May 1939 to recover $5,458.34. Each of the respondents is a citizen of a state other than Massachusetts (R. 2) and at all times involved all of the trustees and shareholders of the petitioner were residents of Worcester, Massachusetts. (R. 130) The judgment of the Court of Appeals was entered March 17, 1941. (R. 138) The petition for certiorari was filed May 20, 1941. The jurisdiction of this court is invoked under section 240(a) of the Judicial Code as amended. (28 U.S.C. Section 347 (a))

The Question Presented.

Whether the Court of Appeals in ordering judgment for the respondents, plaintiffs, on the verdict failed to apply the unwritten law of Massachusetts as declared by its courts within the requirement of Section 34 of the Judiciary Act of September 24, 1789 (28 U.S.C. Section 725) and of the decisions of this court in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 and *West* v. *American Telephone & Telegraph Co.,* 311 U.S. 223.

Statement of Facts.

The respondent brokerage firm maintains offices in many cities of the country for the execution of orders on stock, commodity or other trading exchanges and it holds memberships among others in the New York Stock Exchange, Curb Exchange, Cotton Exchange and Commodity Exchange.

The petitioner, a voluntary association suable as an entity, was created by declaration of trust. (Exh. 1, R. 85 to 90) It has broad powers to buy, sell, import and export live

stock of all kinds, to slaughter live stock of all kinds, and specifically to "deal generally in hides and all other animal products." (R. 85)

While the petitioner claimed it had no account with the respondents, it agreed (R. 19) that as alleged the respondents, as brokers for the account of somebody, actually executed the various transactions referred to in accordance with the rules, usages and customs of the Commodity Exchange, Inc. in New York City and that the respondents received and paid the monies set forth in the declaration.

The petitioner further agreed that the dealings began in 1936 and continued into April 1939 but said that the account on which they took place was not its account but that of one Eli Jacobson. (R. 19)

In addition there was evidence showing the respondents' course of business (summarized in Exhibits 14 (R. 111) 15 and 16, and explained R. 30 to 35) which shows that on each transaction the respondents became obligated on a written memorandum for the purchase funds or contracts sold.

Eli Jacobson was one of the signers of Exhibit 1 and one of the three trustees named therein. He had been since its organization and was at the time of the trial the treasurer of the petitioner duly elected under Article 8. He had sole signing authority on certain bank deposits of the petitioner (R. 50, 56, 82) and his signature alone was sufficient on any check or for the approval of any bill. (R. 49, 60, 87) He was the principal user of the only desk in the head office of the petitioner and he was its chief financial officer. (R. 47, 48) He handled the borrowing and had authority to borrow for the petitioner on his single signature. (R. 76, 92)

All the orders given to and executed by the respondents for the purchase or sale of contracts for future delivery of hides were given by Eli Jacobson (R. 61, 78, 83) who was intentionally dealing on the credit and account of the petitioner. (R. 78)

A second trustee signed two checks paying substantial funds of the petitioner to the respondents (Exhs. 7 and 8; R. 101) and the third trustee, president of the petitioner, knew or should have known from the numerous documents in the petitioner's files and from the petitioner's books that its credit was being used with the respondents.

The respondents' employee who handled all orders on the account was doing business throughout with the Chicago Dressed Beef Company (R. 66, 68, 69) which the respondents had discovered in the course of the usual credit investigation was a trade name of the petitioner for which they established a line of credit. (R. 21, 41, 61, 62)

The first transaction was on August 25, 1936. It consisted of the purchase of a contract calling for the delivery in December of 40,000 pounds of hides which, as the petitioner understood, is the trading unit on the Commodity Exchange (R. 27, 78). A confirmation of the purchase (like Exh. 13-B; R. 108) was immediately sent to the petitioner and a monthly statement (like Exh. 12; R. 104), showing it, was sent at the end of the month.

The respondents' letter to the petitioner (Exh. 2; R. 20) asking for a signature card (Exh. 3; R. 91) resulted in the card's being returned with the specimen signature "Eli Jacobson" shown thereon.

In September 1936 the carload was ordered sold and advices of its sale and the resulting credit were sent to and received by the petitioner. (R. 46) In January 1937 a check for the profit (Exh. 11; R. 103) was sent payable to the Chicago Dressed Beef Company and collected through the petitioner's bank account although the proceeds were personally pocketed by Eli Jacobson. (R. 52)

On April 17, 1937 Eli Jacobson gave another order to purchase a carload of December hides (i.e. a contract calling for delivery in December of 40,000 pounds of hides). The respondents made the purchase, confirmed it in writ-

ing and at the end of the month sent a statement showing that contract on hand together with another one of the same type purchased on April 22 and confirmed in the same way. The first of these was sold at a loss and the line of credit being exhausted the petitioner's check for $900 (Exh. 10; R. 102) payable to the respondents was credited to the account. (Exh. 12; R. 104)

This check was the first of a series of 16 (Exhs. 7, 8, 9 and 10; R. 101-103) all of which were paid to the respondents as collateral, partial payment, or margin on the account carried on their books under the name Chicago Dressed Beef Company. All 16 checks bearing dates from May 14, 1937 to March 31, 1939 were checks of the petitioner and are clearly recorded in its books. Two of them, those of January 12 and 23, 1939, (Exhs. 7 and 8; R. 101) are signed by Mr. Robert Jacobson, a second trustee of the petitioner and its elected secretary. The others are all signed by Eli Jacobson.

All of the numerous papers including confirmations of purchases and sales (like Exh. 13, 2nd and 3rd sheets) monthly statements (like Exh. 12) and statements of closed contracts (like Exh. 13, 1st sheet) to a total of more than 120 during the 2½ years were received at the petitioner's office, delivered to its treasurer Eli Jacobson, studied by him and filed by him in a desk which was the only desk in the office that the trustees of the petitioner had. (R. 76) All but 43 of these papers were destroyed before the suit. Those 43 which comprise most of the communications after June 1938 were before the Court of Appeals in original form. They were Exh. 6 at the trial. (See R. 21-27 for a brief description and explanation of them.)

At various times, the respondents sent to the order of the Chicago Dressed Beef Company various checks (Exh. 11; R. 103), representing profits realized from sales of contracts or returns of cash previously deposited as margin.

All of these checks were collected through the petitioner's bank account and all of them, except the first mentioned above, were recorded in the petitioner's cash receipts book and ledger (Exh. 22 and 26). The petitioner has had the full actual benefit of these payments made by the respondents, which totaled $4,726.90.

The trustees of the petitioner had infrequent formal meetings, but all of them regularly met in September of each year and minuted the reading of the financial report of the petitioner for the year ending the previous June 30. (Exh. 4; R. 75, 91-99) Interim and yearly reports of an outside auditor were had and the witness Weinstein, petitioner's regular bookkeeper, paid bills and took orders on the o.k. of any one of the three trustees. (R. 52-60) The trustees had a general understanding about the business and acted singly on company matters. (R. 75, 76)

Each trustee, as well as two other brothers in the business, had a personal account in the firm ledger. (R. 51) These accounts showed charges of a miscellaneous nature but no entries about the transactions with the respondents. A special account (No. 20) carried all receipts and disbursements relating to transactions with the respondents, together with entries posted from the journal on June 30, 1938 and March 31, 1939 (R. 51, 52, 55) charging losses on these transactions to those dates against the surplus profits or assets of the petitioner. Although Eli was the principal financial man to whom the others left the books, they were open to all the trustees (R. 49, 81). They and the reports accepted at the formal meetings all showed the use of the petitioner's funds and credit for the purpose of dealing with the respondents. The bookkeeper Weinstein referred to the account with the respondents as a firm account (R. 53; Exhs. 19 and 24) and Eli Jacobson testified clearly he was dealing on the petitioner's account and he so acknowledged in writing. (R. 78; Exhs. 17 and 18) Although Eli Jacobson said

his brother trustee president Nathan never knew about these transactions with the respondents (R. 73, 76) they appear in one form or another on over 20 different pages in the firm's books and were taken into firm calculations of profits. (R. 53, 79; Exhs. 21-26)

The petitioner ran a sizeable business. Its assets total well over $100,000 (Exh. 26). Its slaughter of 75 to 100 cattle a week (R. 77) at 40 to 50 pounds per hide would create 240,000 pounds or six carloads, one every eight weeks.

The business transacted through the respondents in 1937 to December involved nine carloads bought and seven sold with never more than two involving $6,000 apiece as the price was up, on hand at any one time. In December nine were bought and six sold, leaving contracts for five cars on hand at January 1, 1938.

In 1938 up to December, twelve cars were bought and ten sold, each involving about $4,000 but there was never more than one on hand until the end of November. During December four more were bought and two sold, so that 1939 opened with four cars on hand, an amount equivalent to less than a year's production.

Sometimes the petitioner sold hides from its slaughter green, as they were taken off the animal, and at other times it salted them down, held them and sold to a tanner (R. 77). Eli Jacobson kept familiar with the hide market prices (R. 78) and he handled sales of these hides (R. 77).

The transactions on the account with the respondents were apparently a hedge. There were never, except at year end, contracts for more than a car or two standing open and the year end carry-over amounted to less than a year's production as the petitioner was then operating. The transactions were the apparent result of a business policy entailing not only the sale, because of storage or handling problems, of the hides actually removed as the animals were killed, but

also the retention of an interest in the price by purchasing hide futures for sale at a later date.

Summary of Argument.

I. The Decision of the Court of Appeals that the Petitioner was Bound by the Transactions Involved Does Not Fail to Apply the Law of Massachusetts Because, According to the Law of Massachusetts, the Transactions Were Valid, Enforceable and Not *ultra vires* the Petitioner.

II. The Decision of the Court of Appeals that there was Evidence Sufficient to Warrant the Jury Verdict of Authorization or Ratification of the Transactions so that the Petitioner was Bound Is Not in Conflict with Massachusetts Law.

Argument.

I. The petitioner could not under Massachusetts law avail itself of the defenses of illegality and ultra vires as it had ample power to carry on the transactions involved and it received full benefit from them.

The purchase and sale of contracts for future delivery of commodities on exchanges or boards of trade, commonly called "dealing in futures," is not gambling, wagering or otherwise illegal.

> *United States* v. *New York Coffee and Sugar Exchange*, 263 U.S. 611 where at 619 it is said:
>
> "The usefulness and legality of sales for future delivery, and of furnishing an Exchange . . . have been fully recognized by this Court in *Board of Trade* v. *Christie Grain and Stock Co.*, 198 U.S. 236, 246."
>
> *In re Rosenbaum Grain Corporation*, 103 Fed. (2d) 656 (C.C.A. 7)

The uncontroverted evidence of the respondents' course of business (R. 30-35) and their completion of these trans-

actions together with the petitioner's agreement (R. 19) that the respondents actually executed the various transactions in accordance with Exchange rules and customs and had received and paid the money set forth in their declaration, establish the transactions as *bona fide* ones on each of which the respondents became obligated and which they have liquidated at expense to them. In such cases, according to the law of Massachusetts, the broker is entitled to recover. It is absolutely immaterial that Eli Jacobson never intended physically to receive any hides.

Ryan v. *Whitney*, 257 Mass. 218.
Harris v. *Friedmann*, 245 Mass. 479.
Bazirgan v. *Arnold & Sears, Inc.*, 275 Mass. 207.
Savoy Finance Co. v. *DeBiase*, 281 Mass. 425.

The petitioner's suggestion that the transactions were "speculative" cannot affect the respondents' right to recover. Every business is within the meaning of the word "speculation," correctly defined, i.e. purchase and sale with the expectation of profit by rise or fall in price. Speculation as engaging in hazardous business transactions for the chance of unusually large profit cannot affect a third party who does business with an alleged speculator particularly when the speculator is acting within an express grant of power to "deal generally in hides and all other animal products." (R. 85.)

The verb "deal" means to "have to do", "have business relations" or "be concerned" with. The purchase and sale through brokers for cash or on credit of contracts for future delivery of hides is certainly included within "dealing" or "having to do with hides." See *Irwin* v. *Williar*, 110 U.S. 499, cited by the Court of Appeals (R. 137).

The respondents are not to be penalized because an official of the petitioner was, as between himself and his associates, on a frolic. He was acting within the charter scope.

The respondents had no cause to suspect otherwise. Certainly they are not chargeable as a matter of law on this record. There is in fact nothing to call to their attention the relative extent of this trading. To an outsider it would appear perfectly consistent with the petitioner's business. Third parties such as these respondents dealing with the petitioner are under no obligation to audit its books or compare purchases made through them with an annual volume of business.

> See *Dolben* v. *Gleason*, 292 Mass. 511, holding a third party not bound by the provisions of a business trust declaration.

The petitioner had its own accountant and private auditors. The records were perfectly clear and the petitioner cannot now suggest that the respondents should have acted as a policeman within the petitioner's own office.

The petitioner is not a fiduciary trust. It is a business organization, and the Court of Appeals was correct in holding that rules as to the powers of business corporations are applicable to it (R. 136-137). See in this connection *Horowitz* v. *State Street Trust Co.*, 283 Mass. 53, 58, where the Massachusetts Court in discussing the powers of a trustee of a business trust cited as its only authorities two cases involving the powers of officers of business corporations.

Of the cases quoted from and cited on pages 10 to 13 of the petitioner's brief in support of its petition, three of them, *Bremer* v. *Hadley*, 196 Mass. 217, *Tuttle* v. *First National Bank of Greenfield*, 187 Mass. 533 and *Ashley* v. *Winkley*, 209 Mass. 509, are cases without application at bar because they deal with trusts under wills and are not at all related to organizations set up for the purpose of conducting commercial business. Of the others, *Dumaine* v. *Dumaine*, 301 Mass. 214, has to do solely with the power of a trustee under an indenture to make binding determinations as between capital and income and *Greco* v. *Hubbard*, 252

Mass. 37, involves only the rights of a creditor against the beneficial owners of shares in a trust alleged to have been an undisclosed principal.

Downey Company v. *Whistler,* 284 Mass. 61, and the companion case of *Downey Company* v. *The 282 Beacon Street Trust,* 292 Mass. 175, as well as *Horowitz* v. *State Street Trust Co.,* 283 Mass. 53, *supra,* the only other cases relied on by the petitioner, deal with trusts owning real estate. They do not contain any language or law contrary to the opinion of the Circuit Court of Appeals. They deal merely with the question of the authority of one trustee to bind the trust, and there was no evidence to show that all trustees of the trust had authorized or ratified the contract sued on. The question of whether the contract sued upon was or was not within the purview of the objects for which the trust was created was not involved in any of them.

So far as any question of the petitioner's power to engage in the transactions involved is concerned, the very most that is presented is a case of abuse of a power where the petitioner has received full benefit of all transactions including the receipt from the respondents of $4,726.90 in cash. The petitioner's story, based as it is, on the default of its treasurer Eli Jacobson, rests at most on an alleged abuse of power which the respondents could not know of. In such situations the law does not look with favor upon the defense of *ultra vires.*

Edwards v. *International Pavement Co.,* 227 Mass. 206.

Dome Realty Co. v. *Gould,* 285 Mass. 294.

Nims v. *Mt. Hermon Boys' School,* 160 Mass. 177 at 180.

McKean Co. v. *Sidebottom,* 277 Mass. 158.

Young v. *United Zinc Companies,* 198 Fed. 593 (C.C.A. 1).

II. The petitioner is not permitted by the law of Massachusetts to escape liability on the ground that the evidence was insufficient to warrant the jury verdict.

In Massachusetts, as elsewhere, the question of authority, whether it is express, implied, or derived from delegation, course of business, acquiescence or ratification, is for the jury.

Lester v. *Webb*, 1 Allen 34.

Reed v. *Ashburnham Railroad Co.*, 120 Mass. 43, where it was said that "agency may be proved by circumstantial evidence, and if there is any such evidence, even though slight, it should be submitted to the jury."

Nims v. *Mt. Hermon Boys' School*, 160 Mass. 177, where on bookkeeping records and reports much less specific than those involved at bar, the defendant was held bound.

Hartford v. *Mass. Bowling Alleys, Inc.*, 229 Mass. 30.

Glovin v. *Eagle Clothing Co.*, 247 Mass. 215, where the deposit of proceeds in the defendant's account and the appearance of the note on its books was held to warrant the jury verdict of ratification.

Forgeron v. *Corey Hill Garage, Inc.*, 249 Mass. 163.

While the above cases deal with corporations, it is equally clear with reference to Massachusetts business trusts that in addition to implied authority, active ratification or passive acquiescence by failure to object will suffice to make actions of a single trustee effective against any kind of a trust. The charge to the jury in this connection (R. 117, 118, 120) was all that the petitioner could ask for.

Bowen v. *Farley*, 256 Mass. 19.

Zevitas v. *Adams*, 276 Mass. 307.

Rand v. *Farquhar,* 226 Mass. 91.
Hull v. *Newhall,* 244 Mass. 207.
Whittier v. *Child,* 174 Mass. 36.

It results that in this case where the petitioner had no exceptions to the charge of the trial justice and where the jury found for the respondents it is only necessary to show there was slight evidence of authority.

The following array of facts is the compelling evidence which took the case to the jury. They are abundant evidence to show the petitioner was bound by the acts of Eli in its name and they adequately sustain the verdict that Eli Jacobson's actions in the petitioner's name were authorized or ratified by his co-trustees Nathan and Robert.

1. Eli was the treasurer, elected by all three trustees from their number, with authority to sign alone checks on certain of the trust's funds, borrow in the trust's name on his own signature, and act generally as the principal financial officer and executive.

2. Bills were paid on the o.k. of any one of the trustees, and the delegated treasurer, Eli, sold the hides of the kill and watched the market.

3. The regular books of account contain numerous entries showing that the transactions with respondents were on the petitioner's firm account. Surplus and profits were charged (R. 52). Auditor's statements reflecting these transactions were presented to all trustees (R. 75, 98, 99). A casual attention to the books would have disclosed the situation.

4. Over 120 communications from the respondents went over and were kept in the only desk which the trustees had. If the petitioner's trustees will not look to see what their co-trustee is doing for over two years, it cannot be charged against these third-party respondents who by sending notices, confirmations and requesting signatures (Exhs. 1, 6,

17, (R. 39, 40, 113) did all any reasonable man would be expected to do.

5. Eli Jacobson initiated all the transactions. Robert signed checks to the respondents. Nathan talked with the respondents' representative (R. 63) and could not help but know the petitioner's funds and credit were being used. Neither he nor Robert can save the petitioner by failing to appear and submit to cross-examination. Their failure to testify is an admission supporting the respondents' position.

Interstate Circuit v. *United States,* 306 U.S. 208, 225-7 and cases cited.
Kirby v. *Tallmadge,* 160 U.S. 379.
Runkle v. *Burnham,* 153 U.S. 216, 225.
Howe v. *Howe,* 199 Mass. 598, 603.

In this last connection, the case relied on by the petitioner at page 17 of its brief, *Poirier* v. *Terceiro,* 224 Mass. 435, is inapplicable, as all of the above facts are affirmative evidence that Nathan and Robert authorized or ratified the transactions.

The case of *Horgan* v. *Morgan,* 233 Mass. 381 is not, as suggested by the petitioner on page 18 of its brief, distinguishable from the case at bar. That case involved a business entity organized under a declaration of trust. While that particular trust was held under Massachusetts decisions to have constituted a partnership, the principle of the case, whereby a shareholder partner was bound as a result of a course of business shown on the trust books, is even more applicable to the situation presented at bar involving the question of the trust itself being bound. If individual shareholders are bound, *a fortiori* the entity of which they are members is bound. As stated in the *Horgan* case, at page 385, evidence that an examination of the books would have disclosed the facts and even casual attention to the

affairs of the organization would have disclosed how its business was being carried on warrants a finding that the defendant was bound by reason of the course of conduct carried on with knowledge and implied assent. The facts in the case at bar are even stronger in this connection than they were in the *Horgan* case. See also *Nims* v. *Mt. Hermon Boys' School,* 160 Mass. 177, *supra,* where records of less clarity than those at bar were held to bind the defendant.

III. Conclusion.

The petition should be denied, for if the petitioner has a defaulting treasurer who knowingly uses firm credit for himself, the loss should not fall on those who deal with him in good faith.

The opinion and decision of the Circuit Court of Appeals are not in conflict with Massachusetts law because it is not yet the law of Massachusetts that a so-called "Massachusetts business trust" is a vehicle under which persons may set up business, call themselves trustees, have a treasurer, turn over financial affairs to him and then, when he enters a deal which turns out badly, avoid responsibility by saying, "Oh, yes, we used company funds, it is in the company's name, the transactions are all over our books but two of us did not pay attention or know all the details, so the company is free and you who paid the money on our credit are out of luck."

That type of situation is far from the law of Massachusetts, so the petition should be denied with costs and judgment on the verdict for the respondents as ordered by the Circuit Court should be entered.

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